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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1518

THOMAS ANDREW GRIFFIN,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Richard B. Bergstresser
12230 N.W. 7th Street
Miami, Florida 33168
(305) 688-2538
Attorney for Petitioner

James A. Sawyer, Jr.
P.O. Box 13777
Gainesville, Florida 32604
(904) 377-8300
Of Counsel

INDEX

Opinion Below 1

Jurisdiction 2

Questions Presented..... 2

Statute..... 3

Statement of the Case..... 3

Statement of Facts..... 4

Jurisdiction of Trial Court..... 7

Reasons for Granting the Writ..... 7

I. This Decision is in Conflict With Other Circuits in That The Fifth and Second Circuits Hold that Simple False Testimony is Sufficient to Charge The Offense of Obstructing Justice Under 18 U.S.C. §1503, While the Sixth and the Ninth Circuits Hold that Such Conduct Does Not Constitute This Offense..... 7

II. Petitioner's Testimony Was of Insufficient Materiality to The Investigation of the Grand Jury to Have Such an Investigation Obstructed by Allegedly False Statements..... 13

Conclusion..... 14

Certificate of Service..... 14

Appendix A—Opinion of the United States Court of Appeals for the Fifth Circuit, filed February 6, 1979..... A1

Appendix B—Excerpts From the Indictment..... A34

Appendix C—Statute, Title 18 U.S.C. §1503..... A38

CASES

Nye v. United States, 313 U.S. 33 (1941)..... 11

United States v. Cohn, 452 F.2d 881 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972)..... 8

United States v. Essex, 407 F.2d 214 (6th Cir. 1969)..... 8

United States v. Howard, 569 F.2d 331 (5th Cir. 1978), *cert. denied*, ——U.S.——, 47 U.S.L.W. 3187 (1978)..... 11,12

United States v. Metcalf, 435 F.2d 754 (9th Cir. 1970).....8,10,11

United States v. Ryan, 455 F.2d 728 (9th Cir. 1970)..... 8

United States v. Walasek, 527 F.2d 676 (3d Cir. 1975)..... 11,12

STATUTES

18 U.S.C. §1503..... 3,4,6,7,8,9

18 U.S.C. §1621..... 7

18 U.S.C. §3231..... 7

28 U.S.C. §1254(1)..... 2

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PETITION FOR A WRIT OF CERTIORARI TO THE
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The Petitioner, Thomas Andrew Griffin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 6, 1979.

OPINION BELOW

The opinion of the Court of Appeals has not as yet been published, and it appears at Appendix A.

JURISDICTION

This is a petition to review the decision of the Court of Appeals for the Fifth Circuit in the case of United States of America v. Thomas Andrew Griffin, No. 78-5093, —— F.2d 2841, rendered on February 6, 1979 (see Appendix A). There has been no motion for rehearing or extension of time for filing a petition for certiorari. The jurisdiction of this Court to review the above mentioned judgment by writ of certiorari is invoked under the provisions of Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether mere false testimony,

not associated with any other conduct, constitutes an act of obstruction of justice under 18 U.S.C. §1503.

2. Whether petitioner's testimony regarding his relationship with another subject of investigation, or his knowledge of a certain airplane crash, were of such sufficient materiality to the grand jury's investigation as to constitute an obstruction of justice.

STATUTE

Title 18 U.S.C. §1503, (18 U.S.C.S. §1503) (June 25, 1948, c. 645, §1, 62 Stat. 769).

STATEMENT OF THE CASE

Thomas Andrew Griffin was convicted in the United States District Court for the Southern District of Florida of corruptly endeavoring to obstruct the

due administration of justice under Title 18 U.S.C. §1503. The United States Court of Appeals for the Fifth Circuit affirmed the conviction on February 6, 1979. Based on the opinion rendered by the court below, no rehearing was sought.

STATEMENT OF FACTS

In September of 1975 an Argentinean-owned aircraft bound for Panama crashed at Miami International Airport. A bank bag containing $15,046 was discovered in the wreckage. In October the Federal Bureau of Investigation began to investigate whether the flight was connected to loansharking activities, including the transportation of money out of the country. The investigation soon focused on Charles "Bob" Ebeling and John Cifarelli, and electronic surveillance, including wire-

taps, was undertaken.

During January , 1976 several conversations between petitioner Griffin and Ebeling were recorded. These conversations dealt primarily with efforts to recover for Ebling the money on the crashed plane. Other names were mentioned during the conversations, as was a debt petitioner owed to Ebeling.

In March, 1976, petitioner was called to testify before a grand jury investigating the financing of loansharking operations, including the possible movement of money from the United States to South America. Petitioner denied knowing Ebeling was involved in illegal loan activities, denied knowledge of certain persons and events, and denied any recollection of other persons and transactions. In particular, petitioner

denied any recollection of discussing the airplane crash with Ebeling. (The portion of the Indictment reciting the allegedly obstructive testimony is included in the Appendix B).

Petitioner was indicted on the basis of this testimony, and was charged with obstruction of justice under 18 U.S.C. §1503 (18 U.S.C.S. §1503). At trial he testified that his grand jury testimony was true or else innocently incorrect. Petitioner was convicted, and on February 6, 1979 his conviction was affirmed by the Fifth Circuit Court of Appeals.

The sole basis of the conviction and affirmance was the falsity of the grand jury testimony. It was never alleged that petitioner ever engaged in any other illegal conduct.

JURISDICTION OF TRIAL COURT

The Federal District Court for the Southern District of Florida had jurisdiction in the first instance under 18 U.S.C. §3231 (18 U.S.C.S. §3231; §1, 62 Stat. 826, June 25, 1948).

REASONS FOR GRANTING THE WRIT

The presently existing conflict in the law of the several circuits has resulted in petitioner's alleged conduct being prosecuted and punished under the obstruction of justice statute, 18 U.S.C. §1503, while in other circuits, the same conduct could be prosecuted and punished only under the less severe provisions of 18 U.S.C. §1621, the perjury statute.

This conflict exists regarding whether an allegation of simple false testimony, not associated with other conduct of the accused, is sufficient to charge the

offense of obstructing justice under 18 U.S.C. §1503. Two circuits have held that such alleged conduct does not constitute this offense: the Sixth Circuit, *United States v. Essex*, 407 F.2d 214, 218 (6th Cir. 1969), and the Ninth Circuit, *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1972) and *United States v. Metcalf*, 435 F.2d 754, 756 (9th Cir. 1970). Two circuits have held that such alleged conduct does constitute grounds for prosecution under the offense of obstruction of justice: the Fifth Circuit, in this instant case, and the Second Circuit, *United States v. Cohn*, 452 F.2d 881 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972).

The conflict in the circuits focuses squarely on the so-called "omnibus clause" of the statute. The statute

begins with a lengthy prohibition of corruptly influencing or intimidating witnesses, grand and petite jurors and officers of the court before or during the performance of their official duty, or injuring them or their property thereafter. Many types of court-related persons are named, and several forms of intimidation or obstruction are mentioned. Then follows the "omnibus clause":

> [o]r *corruptly* or by threats or force or by any threatening letter or communication, influences, *obstructs or impedes* or endeavors to influence, obstruct, or impede, *the due administration of justice*, shall be [punished]. [18 U.S.C. §1503 (emphasis added)].

The circuit courts are in substantial disagreement over the construction of this omnibus clause. The Ninth Circuit has indicated it should be limited to

"intimidating actions," *United States v. Metcalf*, 435 F.2d 754, 756-57 (9th Cir. 1970), while the Third Circuit has said that the clause prohibits acts similar in *result*, rather than character, to the acts proscribed by the specific language of the statute.

The result-oriented construction given the statute in the Second and Fifth Circuits opens this criminal statute to significant judicial enlargement, which not only can, but has led to the unequal result that persons may be prosecuted under the statute for simple perjury in the Second and Fifth Circuits, but not in the Ninth, and probably not in the Sixth. The result-oriented construction could be expanded, for example, to a holding that escape before trial, being a corrupt delay in the administration of

justice, is a triable offense under the omnibus clause.

The monetary penalty which may be imposed for simple perjury is significantly less than the maximum fine for obstruction of justice ($2,000 as opposed to $5,000).

The rule of *ejusdem generis* has been suggested as a limitation on the unbridled judicial expansion of this statute, *United States v. Metcalf*, 435 F.2d 754 (9th Cir. 1970); *United States v. Walasek*, 527 F.2d 676 (3d Cir. 1975). The statute is in the nature of a contempt statute, *cf.*, *United States v. Howard*, 569 F.2d 331, 336 (5th Cir. 1978), *cert. denied*, —— U.S. ——, 47 U.S.L.W. 3187 (1978), and this Court could restrict the application of the omnibus clause to out-of-court contempts, *Nye v. United States*, 313 U.S. 33 (1941).

Such a limitation would support the results of *United States v. Howard*, 569 F.2d 331 (5th Cir. 1978) (selling grand jury transcripts) and *United States v. Walasek*, 527 F.2d 676 (3d Cir. 1975) (destruction of records with knowledge that a subpoena duces tecum was already served on the corporate employer).

The conflict between the circuits as to the ability of section 1503 to reach simple perjury is real and continuing, and therefore introduces inconsistencies and inequality of treatment of persons accused in the various circuits. In a circuit where the issue is unresolved, it is impossible to say whether or not simple perjury violates the act. This *de facto* ambiguity, coupled with the unequal treatment of persons in the circuits that have ruled on the issue,

require an authoritative construction from this Court in order to eliminate the judicially created ambiguity in this criminal statute. Due process requires no less.

The Court, in resolving this conflict, should authoritatively construe the statute to eliminate the vagueness resulting from the present unbridled discretion of the various circuit courts to characterize any disfavored action or omission criminal under this statute, so long as the act or omission is somehow related to the "due administration of justice." This Court's construction, resolving the conflict, would place the proper parameters on this statute.

The materiality of petitioner's testimony is raised as an issue to preserve the same for brief and argument.

Petitioner does not contend that this issue alone would merit the issuance of the writ.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

Richard B. Bergstresser
Attorney for Petitioner

James A. Sawyer, Jr.
Of Counsel

CERTIFICATE OF SERVICE

I, Richard B. Bergstresser, hereby certify that on this 6th day of March, 1979, three (3) copies of the Petition for a Writ of Certiorari were mailed, correct postage prepaid, to the Solicitor General of the United States.

I further certify that all parties required to be served have been served.

Richard B. Bergstresser

Richard B. Bergstresser
12230 N.W. 7th Street
Miami, Florida 33168

Attorney for Petitioner

by James A. Sawyer, Jr.
James A. Sawyer, Jr.
Of Counsel

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5093

United States of America,

Appellee,

v.

Thomas Andrew Griffin,

Appellant.

Appeal from the United States District Court for the Southern District of Florida

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Filed: February 6, 1979

Before WISDOM, GODBOLD and TJOFLAT, Circuit Judges.

WISDOM, Circuit Judge.

Thomas Griffin appeals his conviction under an indictment that charged him with "corruptly endeavor[ing] to obstruct the due administration of justice by testifying falsely" before a federal grand jury. In *United States v. Howard*, 5 Cir. 1978, 569 F.2d 1331, 1334, and *United States v. Partin*, 5 Cir. 1977, 552 F.2d 621, 631, *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189, we left open the question whether perjury by a witness can constitute an obstruction of justice punishable under 18 U.S.C. §1503. The defendant objects on three grounds to the use of §1503 to punish false testimony. He maintains first that the plain language of the statute covers obstructions of justice that result only from the actor's interferences with other witnesses, jurors, or court officials. Because

§1503 was originally enacted as a contempt statute, the defendant also argues that Congress did not intend the statute to cover simple perjury, an act not punishable summarily as contempt of court. Finally, Griffin urges that the statute would be unconstitutional if applied to this case because it does not give fair notice that it punishes false testimony. We reject these arguments and hold that the indictment states an offense under §1503. Accordingly, we affirm the conviction.

I.

In September 1975, an Argentinian aircraft bound for Panama crashed at Miami International Airport. A bank bag containing $15,046 was discovered in the wreckage. In October the Federal Bureau

of Investigation began to investigate whether the flight was connected to loansharking activities, including the transportation of money out of the country. The investigation soon focused on Charles "Bob" Ebeling and John Cifarelli who were placed under electronic surveillance.

In January 1976, the FBI intercepted a number of conversations between the defendant Griffin and Ebeling. In these conversations, they discussed various ways to recover the money found in the crash. They also talked about a debt that Griffin owed Ebeling. Ebeling spoke of attempting to collect from a number of people indebted to him and said that he owed a substantial amount of money himself. The names of several individuals including Jack, Dominick, and Angelo, figured prominently in the

conversations. Although the FBI never identified these individuals, one name the defendant mentioned, Felix Herrerro, was identified as a passenger who died in the Miami crash.

On March 9, 1976, Griffin was called to testify before a grand jury investigating the financing of loansharking operations and the possible movement of money from the United States to South America. In response to questions concerning the crash, the debts, and the individuals mentioned in the conversations, Griffin either flatly denied knowledge or relied on an inability to recall the facts about which he was questioned. The following answers illustrate the nature of his testimony:

Q. What's your relationship with Bob, also known as Charles William

Ebeling?

A. None, I just met him at the track and that's it. I don't even know his name.

Q. Do you know anything about a plane crash of a plane going to South America?

A. Know anything about? No sir.

Q. Have you ever discussed with Mr. Ebeling, Bob, anything about a plane crash being on its way to South America?

A. Not that I can recall, with him.

. . . . . .

Q. Do you know Felix Herrerro?

A. No, I do not. I know a Felix, but it is not Herrerro.

Q. Do you know an individual named Jack?

A. Jack?

Q. Yes.

A. Jack, not that I can recall. In regards to what?

Q. In regards to anything.

A. No.

Q. Did Mr. Ebeling ever tell you that if you didn't pay him the money you owed him you'd put him in the middle between him and some other people, put him in a bad spot?

A. I would put him in a bad spot?

Q. Yes, if you didn't pay him the money you owed him?

A. No.

Q. Do you know an individual named Dominick?

A. No, sir.

Q. Do you know anyone named Angelo?

A. No, sir.

Q. Do you know brothers named Dominick,

Angelo?

A. No.

. . . . . .

At his trial, Griffin testified that his grand jury testimony was true or innocently incorrect. He explained that he had fabricated the conversations about the money found in the airplane crash to avoid a joint financial venture proposed by Ebeling. Other conversations, Griffin said, were engineered by Ebeling to impress his wife. On December 6, 1977, the jury found Griffin guilty of obstructing justice. He was sentenced to 6 months imprisonment and 2 years probation.

II.

A. Section 1503 is composed of two parts.[1]

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1. Section 1503 may be found in Appendix C.

The first portion of the statute prohibits the influencing, intimidation, or impeding of any witness, juror, or court official. The concluding clause of the statute penalizes anyone who corruptly endeavors to influence, obstruct, or impede, the due administration of justice." Relying on *ejusdem generis* and the principle that penal statutes must be strictly construed, the defendant argues that the concluding clause of the statute has no broader reach than the statute's specific language. Rather, the concluding clause makes clear that §1503 prohibits any act that is similar in manner to intimidating witnesses and other court officials even though the act is not expressly described in the first part of the statute. The defendant urges us, therefore, to recognize a distinction between one who induces a witness to

commit perjury, conduct which we expressly held forbidden by the concluding clause of §1503 in *U.S. v. Partin*, 5 Cir. 1977, 552 F.2d 621, *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189, and one who perjures himself.

We have rejected similar reasoning raised by a defendant convicted under §1503 for selling transcripts of secret grand jury testimony to persons under investigation. In *U.S. v. Howard*, 5 Cir. 1978, 569 F.2d 1331, 1333, we said that "we cannot agree with this reading of the statute because it renders the omnibus clause superfluous, *see United States v. Walasek*, 527 F.2d 676, 679 & n.11 (3d Cir. 1975), and because the most natural construction of the clause is that it prohibits acts that are *similar in result, rather than manner*, to the conduct

described in the first part of the statute."[2] (Emphasis added by the court). The issue before us now is, as it was in *Howard*, whether the defendant's conduct tended to obstruct justice. Is the effect of giving false testimony before a grand jury to prevent justice from being duly administered?

The clear implication of our analysis in *Partin* and *Howard* is that perjury constitutes an offense against the effective administration of justice. Although we left that question unanswered in *Partin*, we held that one who

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2. Other courts have applied *ejusdem generis* to section 1503, however, reading the omnibus clause in a manner similar to that suggested by the defendant. *See United States v. Ryan*, 9 Cir. 1972, 455 F.2d 728, 733; *United States v. Metcalf*, 9 Cir. 1970, 435 F.2d 754, 756-57; *United States v. Essex*, 6 Cir. 1969, 407 F.2d 214, 218.

conspired to induce a witness to testify falsely could be prosecuted under the omnibus clause of §1503, not because the means chosen to obstruct justice violated the specific wording of the first part of the statute but because the object of the conspiracy was to obstruct justice. 552 F.2d at 631. In *Howard* we relied on *Partin* in holding that the omnibus clause aims at all conduct that results in an obstruction of justice. We explained further that using threats to prevent a grand jury witness from testifying has the result of destroying evidence. Although the accomplishment of this result by use of threats or bribes falls under the first clause, the destruction of evidence by the defendant alone comes under the omnibus clause. 596 F.2d at 1334.[3] Similarly, using

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3. Several courts have held that persons who destroy evidence relevant to judicial

threats or bribes to prevent a grand jury from testifying truthfully has the result of concealing and altering the nature of evidence. If such conduct constitutes an obstruction of the administration of justice, as we held in *Partin*,[4] then so does testifying falsely; the result in either case is the same.

Footnote Continued—

proceedings violate §1503. *See, e.g., United States v. Walasek*, 3 Cir. 1975, 527 F.2d 676; *United States v. Weiss*, 2 Cir. 1974, 491 F.2d 460, *cert. denied*, 419 U.S. 833, 95 S.Ct. 58, 42 L.Ed.2d 59.

4. Indeed, we defined the statutory term "administration of justice" as "the performance of acts required by law in the discharge of duties such as appearing as witness and giving truthful testimony when subpoenaed." *United States v. Partin*, 5 Cir. 1977, 552 F.2d 621, 641, *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189; *United States v. Howard*, 5 Cir. 1978, 569 F.2d 1331, 1334 n.4.

The same conclusion was reached by the Court of Appeals for the Second Circuit in *U.S. v. Cohn*, 2 Cir. 1971, 452 F.2d 881, *cert. denied*, 1972, 405 U.S. 975, 92 S.Ct. 1196, 31 L.Ed.2d 249. Relying on the plain language of the statute, the *Cohn* court held that an obstruction of justice results when attempts to gather relevant evidence by a judicial body, which is charged by law with the task of investigating and punishing crime, are frustrated by the use of corrupt or false means. "The blatantly evasive witness achieves this effect as surely by erecting a screen of feigned forgetfulness as one who burns files or induces a potential witness to absent himself." 452 F.2d at 884.

The *Cohn* court, however, characterized the gist of the defendant's offense as

the concealment of knowledge from the grand jury rather than the injection of falsehood into the proceedings. And the indictment charged Cohn with evasive as well as false testimony. Griffin reminds us that evasive testimony, which obstructs the system's administration of justice in a procedural way by blocking the grand jury investigation, must be distinguished from testimony which is false. Although perjury may distort the truth, the defendant contends that it does not impede the judicial process; the criminal system is in fact designed to deal with falsehood through cross-examination and other means. Because Griffin was charged with giving only false testimony, he insists that the indictment does not state an offense amounting to an obstruction of the

administration of justice.

[1] Our Court, however, has long recognized that the purpose of §1503 is to protect not only the procedures of the criminal system but also the very goal of that system—to achieve justice. "The statute is one of the most important laws ever adopted. It is designed to protect witnesses in Federal courts and also to prevent a miscarriage of Justice." *Samples v. United States*, 5 Cir. 1941, 121 F.2d 263, 265, *cert. denied*, 314 U.S. 662, 62 S.Ct. 129, 86 L.Ed. 530. The perjurious witness can bring about a miscarriage of justice by imperiling the innocent or delaying the punishment of the guilty. Thus, had Griffin's testimony been merely false, it might well have come under the terms of the omnibus clause of §1503, nonetheless.

Such a case is not before us, however.

[2] The defendant has ignored the actual nature of his testimony. We find it impossible to differentiate a flat refusal to testify from an evasive answer or a falsehood such as Griffin's: "No; I don't know; Not that I can recall". By falsely denying knowledge of events and individuals when questioned about them, Griffin hindered the grand jury's attempts to gather evidence of loan-sharking activities as effectively as if he refused to answer the questions at all. Whether Griffin's testimony is described in the indictment as "evasive" because he deliberately concealed knowledge or "false" because he blocked the flow of truthful information is immaterial. In either event, the government must, and in

this case did, charge in the indictment and prove at trial that the testimony had the effect of impeding justice.

B. Griffin contends that our construction of the statute is contradicted by the legislative history. Section 1503 is derived from the Act of March 2, 1831, 4 Stat. 487. That act outlined the contempt jurisdiction of the United States courts. Section 1 of the 1831 Act, now 18 U.S.C. §401, provided for summary punishment of contemptuous conduct in the presence of the court; section 2, the predecessor of §1503, provided that contempts occurring outside the presence of the court would be punished after indictment subject to the safeguards of trial.[5] Because §1503 was enacted as a

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5. The history of the statute is outlined

federal criminal contempt statute, the defendant insists that it is necessary to determine whether the conduct charged as criminal under §1503 amounts to contemptuous conduct. He points out that the Court of Appeals for the Sixth Circuit has relied on the rule that simple perjury cannot be punished summarily as contempt of court under 18 U.S.C. §401 in holding that a person who files a false affidavit in an endeavor to secure a mistrial cannot be prosecuted under §1503.

Footnote Continued—

in Nelles & King, *Contempt by Publication in the United States*, 28 Colum.L.Rev. 401; 28 Colum.L.Rev. 525 (1928). *See also* Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempt in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv.L.Rev. 1010 (1924); Goldfarb, *The History of the Contempt Power*, 1961 Wash.U.L.Q. 1.

United States v. Essex, 6 Cir. 1969, 407 F.2d 214.[6]

[3,4] We disagree. In the first place, we find that the defendant's testimony in this case amounted to contemptuous conduct. Moreover, we doubt that the limitation on a federal judge's power to punish perjury summarily is also a limitation on the power to punish under §1503.

Originally all false swearing was punishable summarily as criminal contempt in the federal courts.[7] *See, e.g.*,

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6. The *Essex* court also departed from our construction of the omnibus clause of §1503. 407 F.2d at 218. *See* note 2 *infra*.

7. Until 1906, however, the federal courts permitted the witness to invoke the privilege of purgation of contempt by oath and be punished only for the crime of perjury, unless the contempt was clear on its face. *See United States v. Shipp*,

In re Schulman, 2 Cir. 1910, 177 F. 191. In a series of decisions, however, the Supreme Court cautioned against the indiscriminate use of the contempt power to punish the perjurious witness. In *Ex parte Hudgings*, 1919, 249 U.S. 378, 39 S.Ct. 337, 63 L.Ed. 656, a witness was held in contempt by the trial judge after he repeatedly asserted that he could not recall a certain event. The Court ordered relief, explaining that it hesitated to permit a court to impose summary punishment whenever it disbelieved a witness with the object of confining the witness until the court exacted from him a character of testimony which the court would deem to be truthful. 249 U.S. at

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Footnote Continued—

1906, 203 U.S. 563, 574, 27 S.Ct. 165, 51 L.Ed. 319; Curtis & Curtis, *The Story of a Notion in the Law of Criminal Contempt*, 41 Harv.L.Rev. 51 (1927).

384, 39 S.Ct. 337. In a later decision, *In re Michael*, 1945, 326 U.S. 224, 66 S.Ct. 78, 90 L.Ed. 30, the Supreme Court reviewed the propriety of a contempt citation imposed on a witness before the grand jury who answered willingly but whose testimony the trial judge disbelieved after hearing contradictory testimony by other witnesses. Justice Black wrote:

> All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory

evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses. 326 U.S. at 227-28, 66 S.Ct. at 80.

[5] Undeniably, the Supreme Court found that perjury alone does not have a necessary inherent obstructive effect on the administration of justice. The Court made clear, however, that false testimony can amount to contemptuous conduct when added to the element of perjury there is the "'further element of obstruction to the Court in the performance of its duty'". *In re Michael*, 326 U.S. at 228, 66 S.Ct. at 80, *quoting Ex parte Hudgings*, 249 U.S. at 383, 39 S.Ct. 337. As an example, the Court cited with approval a case where the requisite element of obstruction was

found in sham inability to remember and blocking of the court's inquiry. *United States v. Appel*, S.D.N.Y. 1913, 211 F. 495. *See also Schleier v. United States*, 2 Cir. 1934, 72 F.2d 414, *cert. denied*, 293 U.S. 607, 55 S.Ct. 123, 79 L.Ed. 697. *See generally* Dobbs, *Contempt of Court: A Survey*, 56 Corn.L.Rev. 183, 194-200 (1971). This additional element is present in the case before us. Griffin's testimony did not merely require the grand jury to ascertain the truth by resolving contradictory evidence; his denial of knowledge had the effect of closing off avenues of inquiry entirely.

Moreover, the range of conduct punishable under sections 1 and 2 of the 1831 Act was not identical. The critical distinction between the two sections was that summary contempt proceedings

under section 1 left the determination of guilt to the judge rather than the jury. For this reason, the draftsmen intended that section 1 of the Act embrace not only obstructions to the court that were not geographically remote but also more limited kinds of contempt than section 2. "The point [of section 2] was to provide for things not covered by section 1. Section 1 excluded from summary punishment certain misbehaviors which Justice Johnson had said there was inherent power to punish . . . There was no necessity, or even expediency that they be dealt with summarily." Nelles & King, *Contempt by Publication in the United States*, 28 Colum.L.Rev. 401; 28 Col.L.Rev. 525, 531 (1928). Moreover, the Supreme Court cautioned that "[m]eticulous regard for those separate categories of offenses

must be had, so that the instances where there is no right to jury trial will be narrowly restricted." *Nye v. United States*, 1941, 313 U.S. 33, 49, 61 S.Ct. 810, 816, 85 L.Ed. 1172.[8]

Indeed, in *In re Michael*, the Court explained that the issue whether ordinary perjury constitutes contemptuous conduct was to be resolved in the "constitutional setting" of summary contempt proceedings where the procedural safeguards of the Bill of Rights are lacking. 326 U.S. at 227, 66 S.Ct. 78. This concern for the absence of jury trial

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8. The Supreme Court's development of a jury trial right in non-petty criminal contempt cases since 1966, *see Cheff v. Schnackenberg*, 1966, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629; *Bloom v. Illinois*, 1968, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522, may erode this historical, judicial antipathy to the modern counterpart of §1 of the Act, 18 U.S.C. §401.

had prompted the Court, at first, to demand "an extraordinarily high standard of proof—roughly equivalent to the standard for directing a civil verdict" before the contempt power could be used, in place of the perjury statute, to punish false swearing. "But once having verbalized this high standard in terms of palpable certainty, courts then came to view the evidentiary standard as a rule of substantive law. The early requirement that perjury must be 'apparent on its face' to be punishable as contempt became a rule that 'obstruction' . . . must be shown in addition to the perjury . . . ." Note, *Jury Trial for Criminal Contempts: Restoring Criminal Contempt Power and Protecting Defendant's Rights*, 65 Yale L.J. 846, 850-51 (1946).[9] There

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9. Viewing the Court's narrow construction

are no inroads on the defendant's procedural rights, however, when punishment is by way of §1503.[10] We see no reason, therefore, to depart from the natural construction of the statute by reading the restrictive law of summary contempt into §1503.

Footnote Continued—

of what constitutes an 'obstruction to the administration of justice' as limited to the summary contempt context makes sense in light of the common law's classification of the crime of perjury. At common law, the lying witness incurred legal penalties for his conduct even though his testimony did not cause injury to an individual. His truthful testimony was owed to the government. Hence, the perjurer's crime was always viewed as one against the administration of justice. Perkins, Criminal Law, 382 (1957); Silving, *The Oath*, 68 Yale L.J. 1329, 1387-89 (1959).

10. At one time, the traditional perjury statute, 18 U.S.C. §1621, offered more procedural protection than §1503 since convictions for perjury required the testimony of two witnesses. The two-witness rule was eliminated in the federal courts in 1970, however. *See* 18 U.S.C. §1623(e)

[6,7] C. We also reject the argument that §1503 does not give fair notice that it outlaws the defendant's conduct. The omnibus clause of the statute clearly states that it punishes all endeavors to obstruct the due administration of justice. Although that term covers a broad spectrum of conduct, it is not unconstitutionally vague. When the nature of the subject matter is a limitation upon the exactitude with which Congress can formulate a rule to cover the problem, Congress may use a term that conveys the type of conduct regulated rather than enumerate all the specific instances within the legislation. *Miller v. Strahl*, 1915, 239

Footnote Continued—

(1970). *United States v. Koonce*, 8 Cir. 1973, 485 F.2d 374; *United States v. Ruggiero*, 2 Cir. 1973, 472 F.2d 599.

U.S. 426, 434, 36 S.Ct. 147, 60 L.Ed. 364; *Baltimore Ohio R.R. v. ICC*, 1911, 221 U.S. 612, 620, 31 S.Ct. 621, 55 L.Ed. 878. The obstruction of justice statute was drafted with an eye to "the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined." *Anderson v. United States*, 6 Cir. 1954, 215 F.2d 84, *cert. denied*, 348 U.S. 888, 75 S.Ct. 208, 99 L.Ed. 698.

[8] Because of the breadth of the omnibus clause, however, it may not have been actually apparent to Griffin that his conduct would violate §1503. Indeed, judicial opinions differ on whether false testimony is the type of conduct that

constitutes an interference with the due administration of justice. But the requirement that statutes give fair notice cannot be used as a shield by one who is already bent on serious wrongdoing. *See United States v. Ragen*, 1942, 314 U.S. 513, 524, 62 S.Ct. 374, 86 L.Ed. 383, *United States v. Alford*, 1927, 274 U.S. 264, 267, 47 S.Ct. 597, 71 L.Ed. 1040; Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv.L.Rev. 77, 85 (1948). At the very least, Griffin must have known that witnesses before a grand jury proceeding are required to testify truthfully. There is little need of advance notice to a perjurer that his false testimony, which he well knows to be unlawful, is a violation of the law.

III.

[9,10] Turning finally to the record of the grand jury proceeding, we find that Griffin's false testimony was material because it had the natural effect of dissuading the grand jury from its investigation of alleged loansharking in Florida by Ebeling and others. The testimony need not be directed to the primary subject under investigation; it is material if it is relevant to any subsidiary issue or is capable of supplying a link to the main issue under consideration. *Barnes v. United States*, 5 Cir. 1967, 378 F.2d 646, 649, *cert. denied*, 1969, 390 U.S. 972, 88 S.Ct. 1056, 19 L.Ed.2d 1184; *Blackmon v. United States*, 5 Cir. 1940, 108 F.2d 572, 573-74. The questions concerning the airplane

crash, the debt owed to Ebeling, and the persons mentioned in the monitored calls were either concerned with the subsidiary issue of transportation of money out of the country or were aimed at eliciting a link to the alleged loan-sharker.

The judgment of the district court is AFFIRMED.

APPENDIX B

EXCERPTS FROM THE INDICTMENT

The one-count indictment charged that petitioner committed the following instances of obstruction of justice:

p. 3 Q. What's your relationship with Bob, also known as Charles William Ebeling?

A. None. I just met him at the track and thats it. I don't even know his name.

Q. Has he ever discussed with you whether or not the money he loaned you is his own money?
A. I never discussed it with him. If it was, I just said "Give me a hundred or fifty dollars." I figured it was pocket money.

Q. Did he ever discuss with you the fact that he received money from other people to loan to you and people like you?
A. No.

p. 7 Q. Do you know anything about a plane crash of a plane going to South America?
A. Know anything about? No, sir.

. . .

Q. Did he ever tell you he had an interest or money he expected to get from a plane

that had crashed?
A. No.

p. 10 Q. Do you remember if Mr. Ebling, Bob, as you call him, has any business in the garment district?
A. I didn't know. That's all I know of him. I really have no knowledge of the man. I know him from being up at the corner, that's it, at the racetrack, that's it.

p. 12 Q. Do you know Felix Herrerro?
A. No, I do not. I know a Felix, but it is not Herrerro.

Q. What's his last name?
A. I don't know. He came in the office. He was selling horses and its the wrong ---Felix Herrerro, I don't know.

p. 12 13 Q. Do you know an individual named Jack?
A. Jack?

Q. Yes.
A. Jack, not that I can recall. In regards to what?

Q. In regards to anything.
A. No.

p. 13 Q. Did Mr. Ebeling ever tell you that if you didn't pay him the money you owed him you'd put him in the middle between him and some other people, put him in a bad spot?

A. I would put him in a bad spot?

Q. Yes, if you didn't pay him the money you owed him?
A. No.

Q. Do you know an individual named Dominick?
A. No, sir.

Q. Do you know anyone named Angelo?
A. No.

Q. Did Bob ever tell you he got money from a man named Dominick?
A. No, sir.

p. 14 Q. Did you ever have any investment in Argentina with Mr. Ebeling or concern with Mr. Ebeling?
A. No, sir.

Q. Did you ever talk to Bob, Mr. Ebeling, about any money in Argentina, any investment you might have had, any type of money arrangement?
A. I could have, but I don't recall.

p. 14 Q. Did you ever discuss with Bob Ebeling, Dominick, the fact that Dominick had a person beaten with a board?
A. No, sir.

Q. Never discussed that.
A. No, sir.

Q. Did you ever discuss a news program on television where a person was found in a canal or something who was beaten with a board?
A. No, sir. Not that I can recall.

The page references in the indictment refer to the transcript of petitioner's grand jury testimony.

APPENDIX C

18 U.S.C. §1503 provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injres any party or witness in his person or property on account of his attending or having attended such court or

examination before such officer, magistrate, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or pétit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of

justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Supreme Court, U. S.
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No. 78-1518

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS ANDREW GRIFFIN, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JAMES A. HUNOLT
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A33) is reported at 589 F. 2d 200.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1979. The petition for a writ of certiorari was filed on March 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether false testimony that hinders a grand jury's investigation may constitute obstruction of justice in violation of 18 U.S.C. 1503.

2. Whether petitioner's false testimony was material to the grand jury's investigation.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to 18 months' imprisonment, 12 months of which were suspended, to be followed by two years' probation.

1. The evidence at trial showed that in September 1975 an Argentine aircraft bound for Panama crashed at Miami International Airport (Tr. 165-166).[1] Among those killed in the crash was Felix Herrero (Tr. 167). A bank bag containing $15,046 was recovered from the wreckage of the plane (Tr. 167-168).

In October 1975 the FBI began investigating Charles Ebeling and John Cifarelli in connection with loansharking, the financing of loansharking activities, and the transportation of money out of the country (Tr. 102).[2] During this investigation, a number of conversations

[1]"Tr." refers to the one-volume transcript of the trial. References to the transcript of intercepted conversations between petitioner and Ebeling are to the date and time of the separately paginated conversations. "G.J. Tr." refers to the one-volume transcript of petitioner's grand jury testimony.

[2]Prior to petitioner's trial both Ebeling and Cifarelli were convicted of conspiracy to use extortionate means to collect extensions of credit, in violation of 18 U.S.C. 894(a), and obstruction of justice, in violation of 18 U.S.C. 1503. Ebeling was also convicted of collecting an extension of credit by extortionate means, in violation of 18 U.S.C. 894 and 2 (Tr. 121; S.D. Fla. No. 77-201-CR-WMH). Their convictions were affirmed. *United States* v. *Cifarelli*, 589 F. 2d 180 (5th Cir. 1979).

between petitioner and Ebeling were intercepted pursuant to court-authorized wire interceptions. The conversations dealt largely with the efforts of petitioner and Ebeling to recover the money found in the wreckage of the crashed Argentine airplane. In these conversations, petitioner assured Ebeling on various occasions that he was attempting to recover the money found in the crash (1/19/76, 6:29 p.m., at 2-3; 1/19/76, 9:54 p.m., at 3; 1/20/76, 9:31 a.m., at 1-2; 1/21/76, 6:26 p.m., at 3). Petitioner stated that Felix Herrero is "the only man we're worried about" (1/19/76, 6:29 p.m., at 4), that the airplane was ultimately bound for Argentina (*id.* at 6), and that "16,000" was found in a black bag (1/19/76, 9:54 p.m., at 2). Petitioner and Ebeling discussed the statements petitioner should make to federal authorities to obtain return of the money (*id.* at 2-5).

During these conversations, petitioner also discussed a debt that he owed Ebeling (Tr. 119). Ebeling explained that he had to collect money not only from petitioner, but also from three or four other persons (1/25/76, 9:07 a.m., at 3).[3] Among those mentioned during the conversations were "Dominic," "Angelo," and "Jack."[4] Ebeling told petitioner that he had received money from Dominic, but that he had a "legitimate thing" with Angelo (1/26/76, 8:22 p.m., at 3). Petitioner told Ebeling on one occasion that he had talked to Jack, and on other occasions that he was awaiting calls from Jack (1/21/76, 6:26 p.m., at 1; 1/23/76, 6:18 p.m., at 3, 1/25/76, 9:07 a.m., at 10).

[3]Petitioner assured Ebeling that he would obtain money to make a payment on his loan (1/26/76, 3:15 p.m., at 1-2).

[4]None of those individuals was further identified during the recorded conversations or at trial.

2. On March 9, 1976, petitioner was called to appear before a federal grand jury investigating loansharking, the financing of loansharking operations, and the possible movement of money from the United States to South America (Tr. 82). Petitioner testified that he knew Ebeling slightly but that he had no relationship with him (G.J. Tr. 3). Petitioner stated that Ebeling had never discussed the source of money he loaned to petitioner (G. J. Tr. 5-6). Petitioner denied being aware of the crash of an airplane destined to South America and denied discussing that crash with Ebeling (G.J. Tr. 7). He stated that he did not know Felix Herrero, or any one named Dominic, Angelo, or Jack (G.J. Tr. 7, 12-13). Petitioner testified that he was not aware that Ebeling had stated that he had obtained money from Dominic (G.J. Tr. 13-14). He could not recall whether he had talked with Ebeling about any financial arrangements in Argentina (G.J. Tr. 13-14).

3. At trial petitioner testified that his grand jury testimony was true or innocently false (Tr. 235, 237-238). According to petitioner, the subjects of his intercepted conversations with Ebeling were fictitious or otherwise innocuous (Tr. 231-233, 240, 269-273, 315).

ARGUMENT

1. Petitioner contends (Pet. 7-14) that false testimony before a grand jury does not constitute obstruction of justice in violation of 18 U.S.C. 1503. That claim was properly rejected by the court of appeals (Pet. App. A8-A28) in an opinion on which we essentially rely.

a. The crime of obstructing justice is not limited to improper interference with witnesses, jurors, or court officials. 18 U.S.C. 1503 speaks in general and broad terms to prohibit the action of one who "corruptly * * * influences, obstructs, or impedes, or endeavors to

influence, obstruct, or impede, the due administration of justice * * *." As the court of appeals observed (Pet. App. A16), the objective of the statute is to prevent contrived miscarriages of justice. Conduct that results in the submission of false evidence or the withholding of material information may violate the statute if it so impedes the flow of truthful information that "the due administration of justice" is frustrated or impeded. See, *e.g.*, *United States* v. *Walasek*, 527 F. 2d 676, 679-681 (3d Cir. 1975) (destruction of relevant records); *United States* v. *Cohen*, 202 F. Supp. 587 (D. Conn. 1962) (submitting false document to grand jury). Cf. *United States* v. *Vixie*, 532 F. 2d 1277 (9th Cir. 1976) (submission of false documents obstructed administrative proceedings in violation of 18 U.S.C. 1505); *United States* v. *Fruchtman*, 421 F. 2d 1019 (6th Cir.), cert. denied, 400 U.S. 849 (1970) (same); *United States* v. *Tallant*, 407 F. Supp. 878 (N.D. Ga. 1975) (same).

The court of appeals properly concluded (Pet. App. A17-A18) that petitioner's false testimony obstructed and hindered the grand jury's investigation into criminal loansharking and related activities. Petitioner's mendacity impeded the criminal investigation at its earliest stages before the grand jury (Tr. 82-83) and thereby obstructed the due course of the administration of justice. See *United States* v. *Cohn*, 452 F. 2d 881, 883-884 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972); *United States* v. *Alo*, 439 F. 2d 751, 753-754 (2d Cir.), cert. denied, 404 U.S. 850 (1971).

b. Petitioner contends (Pet. 7) that his conduct before the grand jury was "simple false testimony" and that, although such testimony may constitute perjury under 18 U.S.C. 1621, it is not obstruction of justice within the

scope of 18 U.S.C. 1503.[5] The problem with petitioner's contention is that he was not convicted for "simple false testimony" but for false testimony that obstructed and impeded the due administration of justice.

Petitioner's reliance (Pet. 8) on *United States* v. *Essex*, 407 F. 2d 214 (6th Cir. 1969), is therefore misplaced. In *Essex*, the court of appeals held that a false statement made in an affidavit submitted to the district court was not an obstruction of justice in violation of 18 U.S.C. 1503. Relying on this Court's decision in *In re Michael*, 326 U.S. 224 (1945),[6] the court ruled that "the mere rendering of false testimony," without more, does not obstruct the due administration of justice within the meaning of 18 U.S.C. 1503. 407 F. 2d at 218. The court concluded that, in addition to giving false testimony, the defendant must be shown to have hindered or obstructed

[5]Petitioner notes (Pet. 7) that the perjury statute has a less severe maximum sentence (five years' imprisonment and a $2,000 fine) than the obstruction of justice statute (five years' imprisonment and a $5,000 fine). Petitioner's sentence in this case, however, was within the maximum under either statute. Moreover, petitioner apparently could have been tried under 18 U.S.C. 1623 (false declaractions before a grand jury), which carries the more severe maximum sentence of five years' imprisonment and a $10,000 fine.

Petitioner has not claimed that, *if* his conduct were punishable under 18 U.S.C. 1621, it *could not* be punished under 18 U.S.C. 1503. Cf. *United States* v. *Batchelder*, No. 78-776 (June 4, 1979). Instead, his claim is that his false testimony did not constitute obstruction of justice under 18 U.S.C. 1503.

[6]The Court held in *In re Michael* that false testimony, by itself, does not necessarily constitute contempt of court (326 U.S. at 227):

> All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on the truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process.

the administration of justice, as by interfering with the jury's investigation. See *ibid.*; see also note 6, *supra*. The indictment in this case, however, alleged precisely that petitioner's false testimony was an "endeavor to obstruct and impede the due administration of justice." (Govt. Ct. App. Br. 20). The evidence at trial showed that petitioner's false testimony hindered the grand jury in its investigation (Tr. 82-83), and the jury was instructed that it must find as essential elements of the offense that petitioner gave false material statements and that in doing so he endeavored to obstruct the due administration of justice (Tr. 355). Since the essential element of obstruction was charged and proved in this case, the decision in *Essex* is not in conflict with the decision of the court below.

c. Petitioner's contention (Pet. 8) that the decision in this case conflicts with *United States* v. *Ryan*, 455 F. 2d 728 (9th Cir. 1971), and *United States* v. *Metcalf*, 435 F. 2d 754 (9th Cir. 1970), also is incorrect.

In *Ryan* the defendant had destroyed certain documents that were sought during the course of investigations by the Internal Revenue Service and a grand jury. The court held that the administration investigation was not a "proceeding" within the coverage of Section 1503 (see 18 U.S.C. 1505) and that the destroyed documents were not material to the grand jury investigation. 455 F. 2d at 733-735. By contrast, the grand jury investigation in this case was unquestionably a "proceeding" under Section 1503[7] and, as we show below (pages 8 to 9), petitioner's false testimony was material to the grand jury's investigation.

In *Metcalf* the court of appeals held that Section 1503 is inapplicable to acts that occurred before judicial

[7]*E.g.*, *United States* v. *Campanale*, 518 F. 2d 352, 365-366 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

proceedings have been initiated, as by the filing of a criminal complaint. 435 F. 2d at 757.[8] The court of appeals went on to state, in dictum, that the obstruction of justice offense "would ordinarily seem to be limited to intimidating actions." Even if this dictum were the holding in *Metcalf*, it would not be in conflict with the decision in this case. The suggestion that obstruction of justice "ordinarily" involves intimidation is not in conflict with a conclusion that sometimes it does not. Moreover, in *United States* v. *Vixie, supra*, 532 F. 2d at 1278, the Ninth Circuit necessarily rejected the dictum in *Metcalf* in holding that the submission of a false document to the IRS constituted obstruction of justice under 18 U.S.C. 1505. There is thus no conflict among the courts of appeals warranting further review in this case.

2. Petitioner urges (Pet. 13), without argument, that his false testimony was not material to the grand jury's investigation. The grand jury was investigating loansharking and the secret exportation of money from the United States (Tr. 82). Petitioner's false statements concerned the loansharking activities of Ebeling (who was subsequently indicted by the grand jury) and the attempted removal of more then $15,000 from the United States to South America. These subjects were the proper focus of the grand jury's inquiry, and petitioner's testimony was therefore plainly material to its investigation. See *United States* v. *Whimpy*, 531 F. 2d 768, 770 (5th Cir. 1976); *United States* v. *Parr*, 516 F. 2d 458, 470 (5th Cir. 1975); *United States* v. *Saenz*, 511 F. 2d 766, 768 (5th Cir. 1975); cert. denied, 423 U.S. 946 (1975). Moreover, petitioner's

[8]Here, of course, petitioner's false testimony was given as part of the ongoing grand jury proceeding.

false and misleading testimony hindered the grand jury in performing its lawful duties (Tr. 82-83).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JAMES A. HUNOLT
Attorney

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